IN THE

# UNITED STATES

# Court of Appeals

## FOR THE NINTH CIRCUIT

SEARS ROEBUCK & COMPANY,
a corporation,
Appellant,

vs.

SIDNEY SCHULEIN, Trustee in Bankruptcy of the Estate of Charles Robert Baldwin and Betty June Baldwin, bankrupts,
Appellee

No. 16719

## BRIEF OF APPELLEE

**On Appeal from the United States District Court for the Eastern District of Washington, Northern Division**

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# A. SUBJECT INDEX

# AUTHORITIES CITED

## CASES



## STATUTES

## B. APPELLANT'S STATEMENT OF JURISDICTION AND STATEMENT OF CASE

Appellee accepts the jurisdictional statement of the appellant, together with its statement of the case.

## C. ARGUMENT

## D. ANSWER TO SPECIFICATIONS OF ERROR

The three specifications of error made are so intertwined and interdependent that it becomes impossible to discuss them separately.

This is not an attempt by a trustee in bankruptcy to wrest from the bankrupt property which might be exempt to him. It is merely the exercising of his right to avoid a security transaction. Sec. 63.12.010, Revised Code of Washington (set forth at page 5 of appellant's brief) recognizes the validity of an unfiled conditional sales contract as between vendor and vendee. It says, however, that the sale shall be absolute as to the rights of subsequent creditors.

If the bankrupt had not filed his petition in bankruptcy, title to the property sold would have remained in appellant as security for the payment of the purchase price. There would have been no exemption available to him to the extent of the unpaid balance of the purchase price.

## E. ANSWER TO ARGUMENT OF APPELLANT

**1. Answer to contention that "title to exempt property at no time is in a bankruptcy trustee".**

We are utterly unable to see the significance of this statement. First of all, it is not the exempt property which is sought by the trustee. Instead, the distinction which appellant fails to make is that in this case the trustee is merely seeking to avail himself of the rights of a subsequent creditor and to preserve the voidable lien for the benefit of all creditors. Moreover, the property in question was not exempt to the bankrupt as between the bankrupt and appellant as vendor. If the trustee had not challenged the contract of sale, appellant would have remained in a favored position, with retention of title and the right either to repossess or collect the balance of the purchase price. In the present case the rights of the bankrupt for whose benefit the exemption laws were enacted are not affected or disturbed. The only change made is that the trustee now stands in the position of the vendor.

**2. Answer to contention that Sec. 70(e)(2) does not purport to apply to exempt property.**

Again we reiterate the proposition that this was a proceeding to preserve the benefits of a security transaction for the trustee. Since title to the property was reserved in the appellant vendor until payment of the purchase price, the property in question had not risen to the dignity of property of the bankrupt. As between vendor and vendee, the rights were solely in the vendor.

We draw to the Court's attention the provisions of

Section 6 of the Bankruptcy Act (11 U.S.C.A. §24) which provides:

> "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however, That no such allowance shall be made out of the property* which a bankrupt transferred or concealed and which is recovered or *the transfer of which is avoided under this Act for the benefit of the estate, except that where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.*" (Italics ours)

This provision was followed in the present case. The bankrupt was allowed as exempt the value of the property in excess of the voided transfer. It would be hard to express in any clear language and intendment that a security transaction such as this could be avoided.

> "A debtor cannot claim an exemption as against an obligation representing the purchase price of the property claimed exempt."—*In re Phillips*, 209 Fed. 490.
>
> "An unfiled conditional seller has no standing to complain of the failure of the trustee to set aside exemptions."—*Sears-Roebuck & Co. v. McAllister* (9th Cir.), 184 F. (2d) 487. (Refers to *Lockwood v. Ex. Bank,* 190 U.S. 294 (1902) ).

This is the concern of the bankrupt and not that of the creditors.

It should be borne in mind that under the laws of the State of Washington pertaining to exemptions, household goods are not per se exempt. They must qualify for exemption (the exemption in this case being a limit of $500), and the particular property must be claimed as exempt. The exemption laws are not self-executing. Sec. 6.16.080; 6.16.090, Rev. Code of Washington.

What the bankrupt acquires as exempt is his "equity" over and above the previously existing lien or, as Section 6 of the Bankruptcy Act states, "such excess".—*Hemsell v. Raab* (5th Cir.), 29 F. (2d) 194; *In re Porter,* 3 Fed. Supp. 582.

**3. Answer to contention that "the bankrupt's exemptions are not affected by any interest Sears may have in the exempt property."**

We have no quarrel with this general statement, which only serves to point up the proposition that the bankrupt's exemptions are not affected by the transferring of the appellant's rights to the trustee.

**4. Answer to contention that "The trustee cannot require the bankrupt to pay funds into the estate which are not subject to inclusion in the estate".**

We believe that this argument is immaterial. Obviously the trustee cannot and will not compel the bankrupt to pay funds into the estate but the trustee will insist that the bankrupt either pay the balance of the purchase price owing or resort to the right of repossession under the contract of sale.

## F. ADDITIONAL ARGUMENT IN SUPPORT OF JUDGMENT

As we have mentioned before, the exemption laws of the State of Washington are not self-executing. Until a claim is made by a debtor and a determination is made, there can be no exemption. In the present case the trustee designated as exempt only the "equity" of the bankrupts in the property being purchased from appellant, and it was that interest, and only that interest, which was ultimately set aside to the bankrupts as exempt. Although a complaint had been made of the original designation of exempt property (Tr. 21), when the amended report of exemptions was filed (Tr. 40) it was approved by the Referee. And no complaint has been made on that award. We therefore have a situation where appellant's whole theory that the trustee is attempting to take over exempt property collapses.

The language used by the District Judge in *In Re Mattingly,* 42 Fed. Supp. 608, relative to the purpose of exemption laws and their effect in situations such as we find in this case is persuasive. In that case the court said:

> "Exemption laws are simply for the benefit of the debtor and not for the purpose of enabling some creditor to secure for himself a larger percentage of the debtor's estate than is secured by other general creditors. In the present case the petitioning creditors are only general creditors in that they failed to record their conditional sale contract, which is required by the Kentucky law in order to give them a

lien against the property superior to other creditors (citing cases). They could have been secured creditors if they had so desired, but for reasons sufficient unto themselves they evidently preferred not to record their mortgage. I see no principle of equity which would require that after having intentionally abandoned their position as secured creditors for reasons of their choosing, they be now restored to that position to the prejudice of other general creditors."

## CONCLUSION

It is respectfully submitted that the order heretofore entered should be affirmed.

Respectfully submitted,

THOMAS MALOTT

Attorney for Sidney Schulein,

Trustee in Bankruptcy